We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0093/10 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

A.S.D. Pallacanestro Femminile Schio
Viale dell'Industria C.P. 305, 36015 Schio, Vicenza, Italy

- Claimant -

represented by Mr. Carlo Spillare, Attorney at Law,
Viale della Pace n. 174, 36100 Vicenza, Italy

vs.

Ms. Kara Braxton

- Respondent -

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FIBA Arbitral Tribunal (FAT)

1. The Parties

1.1. The Claimant

1. A.S.D. Pallacanestro Femminile Schio (hereinafter "Club" or "Claimant") is a professional basketball club with its seat in Schio, Italy. Claimant is represented by Mr. Carlo Spillare, attorney-at-law in Vicenza, Italy.

1.2. The Respondent

2. Ms. Kara Braxton (hereinafter the "Respondent") is a professional basketball player of USA nationality. Respondent is not represented by counsel.

2. The Arbitrator

3. On 19 May 2010, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

4. None of the Parties has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Background Facts

5. On 28 May 2008, Claimant and Respondent signed a contract (hereinafter referred to as the "Player Contract") according to which Respondent was to be employed by Claimant for the 2008-2009 basketball season. Pursuant to the Player Contract, Claimant undertook to pay a total net salary of USD 310,000.00 to Respondent, payable as follows:

> *"__Payment:__*
>
> ***Salary: $310,000 US Dollars*** ***Payment will be structured as follows:***
>
> ****Upon signing by all parties*** ***$10,000.00 US Dollars***
>
> ***Player agrees that should she fail to report in a timely fashion for the 2008-2009 season, the advance payment of $10,000 must be returned to the club promptly. Payment is an advance on player salary, not a signing bonus.***
>
> | | |
> |---|---|
> | *October 10th, 2008* | *$40,000.00 US Dollars* |
> | *November 10th, 2008* | *$40,000.00 US Dollars* |
> | *December 10th, 2008* | *$40,000.00 US Dollars* |
> | *January 10th, 2009* | *$40,000.00 US Dollars* |
> | *February 10th, 2009* | *$40,000.00 US Dollars* |
> | *March 10th, 2009* | *$40,000.00 US Dollars* |
> | *April 10th, 2009* | *$40,000.00 US Dollars* |
> | **May 10th, 2009* | *$20,000.00 US Dollars* |
>
> *[...]"*

6. In addition, the Parties agreed on various bonuses in case the Club's team would reach certain sporting goals.

7. Moreover, the Player Contract stipulates the following:

*"**Player Deportment:***

*The player agrees to conduct herself in a professional manner and will adhere to all team rules and policies as listed by the club. The club will provide **all** rules in written English form prior to the arrival of the player at the club's seat. Under no circumstances will player be levied any fine in an amount greater than $ 100.00 US Dollars. Should club opt to fine player for a rule infraction as listed in the supplied list of club rules, (as presented to player prior to her arrival at the club's seat) agency will be notified prior to any fine being deducted from player salary.*

Player Arrival:

Player agrees to depart for the club's seat seven (7) days following the end of her team's Women's National Basketball Association (WNBA) regular season and play-offs (should player's team participate in the 2008 WNBA play-offs), Player understands that club player (sic) a Euroleague game on October 8th and will do all in her power to arrive in time to play and prepare for the said Supercoppa game. Player agrees to remain in Italy until the final game of the season, herein construed to be May 15th, 2009. She agrees to fulfil her commitment to the team for the entire season and play-offs.

[...]

Contract Guarantee:

[...]

*The Club may unilaterally rescind the contract without further compensation to Player if the Player **is convicted** for the usage and/or trafficking of illegal substances. The Player agrees that the Club has the right to unilaterally rescind the contract without any further obligation to the Player should she become pregnant **AND UNABLE to perform** during the contract period." [emphasis in the original]*

8. Also on 28 May 2008, Claimant and Respondent's agent, TTM Management, represented by its founder and president Trisonya Abraham, signed an agreement (titled and hereinafter referred to as the "Fee Agreement") by which Claimant agreed to pay TTM Management an agent fee of USD 31,000.00 for her representation of Respondent (hereinafter referred to as the "Agent Fee"). The Agent Fee was payable in two installments, namely USD 15,500.00 (Payment 1) immediately upon the signing of

the Player Contract and USD 15,500.00 within forty-eight hours upon Respondent's arrival at Claimant's seat in Italy, following successful completion of the medical examination.

9. On 9 July 2008, Claimant paid USD 10,000.00 to Respondent and USD 15,500.00 to TTM Management.

10. Respondent had agreed to depart for Schio within seven days following the end of the WNBA's regular seasons and play-offs. Respondent's last game took place on 5 October 2008. The exact date of her arrival in Italy is not documented. However, it seems that she left the USA on 12 October 2008. Respondent still missed the first Euroleague game of the Club in Russia which took place on 16 October 2008 because she had failed to get a valid visa for entering Russia.

11. On 17 October 2008, Claimant paid USD 39,125.00 to Respondent. After playing her first game for the Club on 19 October 2008, Respondent immediately went back to the USA since she had to appear before a judge in the USA in connection with a charge for __________.

12. Respondent returned to the Club on 29 October 2008, two hours before the Euroleague game against Kosice. Respondent missed therefore another Euroleague game on 22 October 2008 and one game of the Italian League on 26 October 2008.

13. After her return, Respondent informed Claimant about the decision of the judge in the USA that she had to __________ during a period of 30 days.

14. On 30 October 2008 and on 1 November 2008, Respondent did not appear at the training sessions of Claimant's team.

15. On 1 November 2008, Claimant informed Respondent verbally about its decision to rescind the Player Contract. By email dated 3 November 2008, Claimant's counsel wrote to Respondent and her agent in the following terms:

> *"I am officially informing you the decision of A.S.D. Pallacanestro Femminile Schio to rescind the contract with Kara Braxton causing all these essential violations:*
>
> *1-She retired (sic) the visa too late and she missed the game in Russia at Moscow;*
> *2-She flight (sic) in the States after her first game and she missed the game of Euroleague against Montpellier and the game of Italian league at Priolo;*
> *3-She did not informed (sic) the club regarding her legal problems for ________; for sure, if the club should have known the personal and the legal problems of Kara, it should not have signed the contract.*
> *4-At the arrival from the States, last week, the player showed us a document where she has to ________; this is impossible it will be respected, because the player will be on road, she will not be able to ________ and the club do not know, what can happen if the player misses ________ and do not want future problems regarding this.*
> *5-Last Thursday the player did not come to the practice;*
> *6-Last Saturday the player did not come to the practice;*
> *7-and so on: she lost her mobile phone at the army base; she arrived here with the bag of another person taken at Venice airport; she had a bad behaviour with the lady (of the club) that was going with her to the army base.*
>
> *Please, the apartment has to be free until tomorrow.*
>
> *We are available to take the player and her family at the airport.*
>
> *We reserve to ask back to the player the money she received (USD 40.000) and to demand for damages suffered causing the player's non-fulfiment.*
>
> *Best regards.*
>
> *Carlo Spillare"*

16. By letter dated 5 February 2009, Claimant's counsel asked Respondent to pay to Claimant the amount of USD 77,762.26. This amount consisted of the paid salary, paid air-tickets, the paid Agent Fee and several damages, *inter alia* a lost mobile phone in the amount of EUR 279.00.

3.2. The Proceedings before the FAT

17. On 5 May 2010, Claimant filed a Request for Arbitration in accordance with the FAT Rules.

18. By letter dated 26 May 2010, the FAT Secretariat confirmed receipt of the Request for Arbitration. In the same letter, the FAT Secretariat also confirmed the payment of the non-reimbursable handling fee of EUR 3,000.00 on 23 April 2010 and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondent to file her Answer to the Request for Arbitration in accordance with Article 11.2 of the FAT Rules by no later than 17 June 2010 (hereinafter the "Answer"). The letter also requested the Parties to pay the following amounts as an Advance on Costs by no later than 10 June 2010:

"Claimant (WBC Schio)	*EUR 4,000*
Respondent (Ms Braxton)	*EUR 4,000"*

19. Because the delivery of the aforementioned letter to Respondent failed, the FAT Secretariat re-sent it by email dated 25 June 2010 to Respondent's agent. The Arbitrator modified the time limits for Respondent to file the Answer until 12 July 2010 and to pay the Advance on Costs until 5 July 2010.

20. By email dated 12 July 2010, Respondent's agent informed the FAT Secretariat that Respondent was "in the process of hiring an attorney to assist her with the case." By email of the following day, the FAT Secretariat called Respondent's attention to the expired time limit for her Answer and recommended to file a formal request of postponement of the time limit.

21. By letter dated 14 July 2010, the FAT Secretariat confirmed receipt of Respondent's

request for an extension of the time limit for the submission of the Answer and informed the Parties about the Arbitrator's decision to grant an extension of this time limit until 23 July 2010. Moreover, the FAT Secretariat requested Respondent to pay within the same time limit her share of the Advance on Costs.

22. By letter dated 29 July 2010, the FAT Secretariat informed the Parties about a further request for a last extension of the time limit until 5 August 2010 for the submission of the Answer which was requested by Respondent's agent by telephone. The Parties were advised that according to Article 14.2 of the FAT Rules the Arbitrator would proceed with the arbitration if Respondent failed to submit an Answer within this time limit. The FAT Secretariat requested once more Respondent to pay, within the same time limit, her share of the Advance on Costs.

23. By letter dated 11 August 2010, the FAT Secretariat confirmed receipt of Claimant's share of the Advance on Costs. Furthermore, the FAT Secretariat informed that Respondent had failed to submit an Answer to the Request of Arbitration as well as to pay her share of the Advance on Costs. In accordance with Article 9.3 of the FAT Rules Claimant was invited to substitute for the missing payment of Respondent to ensure that the arbitration would proceed.

24. By letter dated 18 August 2010, the FAT Secretariat confirmed receipt of the full amount of the Advance on Costs. In the same letter, the FAT Secretariat informed the Parties that despite Respondent's failure to submit an Answer and according to Article 14.2 of the FAT Rules the Arbitrator decided to proceed with the arbitration and that he declared the exchange of documents complete. The Arbitrator invited the Parties to submit a detailed account of their costs until 30 August 2010.

25. By email dated 27 August 2010, Claimant submitted a detailed account of costs with

the total amount of EUR 14,672.02 which was summarized as follows:

"Expenses		*1.576,71*
Rights		*1.431,00*
Honorary		*11.100,00*
		14.107,71
Welfare and assistance lawyers fund 4% on EUR 14,107.71		*564,31*
	TOTAL	*14.672,02"*

26. Respondent did not submit an account of her costs.

27. The Parties did not request the FAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the parties.

4. The Parties' Submissions

4.1. Summary of Claimant's Submissions

28. Claimant requests the payment of a total amount of USD 205,812.50. This amount consists of a refund of paid salaries in the amount of USD 40,312.50 plus interest, as well as damages in an amount of USD 165,500.00 (including a refund of paid Agent Fees of USD 15,500.00 and further damages, e.g. flight tickets, pre-payment of allowances, lost mobile phone and car return).

29. Claimant submits in essence that:

It timely fulfilled its obligations under the Player Contract. In particular all contractually agreed amounts were paid in time. Respondent breached the Player Contract by missing the first Euroleague game on 16 October 2008 because she had not secured herself a valid visa for Russia, by her failure to disclose __________ which made it necessary for her to return to the USA for a court hearing and to __________ afterwards, by missing the Euroleague match of 22 October 2008 and the Italian league match of 26 October 2008 and by missing the training sessions of 30 October 2008 and 1 November 2008. Claimant had therefore no other choice but to rescind the Player Contract, which it did on 3 November 2009. The claim for restitution of paid salaries in the amount of USD 40,312.50 results from Claimant's payments of USD 50,000.00 to Respondent minus the compensation for Respondent's participation in two games for which the Club is prepared to pay a compensation of USD 9,687.50, corresponding to ¼ of a monthly salary.

30. With regard to its claim for damages, Claimant submits that the Club lost two games where Respondent did not play and that it also lost the game of 29 October 2008 in which Respondent was able to play only a few minutes because of her bad physical condition. Furthermore, the Club could not substitute Respondent with another player of a comparable level and did not reach the technical level it expected to achieve when it contracted Respondent. In fact, the Club lost nearly all matches in the Euroleague tournament and was eventually eliminated.

4.2. Claimant's Request for Relief

31. Claimant submits the following requests for relief:

> *"For all has been indicated upon we put forward to the FIBA ARBITRAL TRIBUNAL the following*

REQUESTS:

1- because of the established resolution ascribed to Ms. Kara Braxton, condemning Ms. Kara Braxton to the restitution to A.S.D. PALLACANESTRO FEMMINILE SCHIO of the received amounts, less the sums for the time she played for the club, equivalent to USD 40.312,50 with the addition of legal interests from 3rd November 2008 to the settlement;

2- condemning Ms. Kara Braxton to compensate the damages caused to A.S.D. PALLACANESTRO FEMMINILE SCHIO fixed in the amount of USD 165.500,00, or in a different amount, higher or lower considered equitable;

3- condemning Ms. Kara Braxton to the repayment of the attorney fees of the judgment."

4.3. Summary of Respondent's Submissions

32. Despite several invitations by the FAT and repeated promises by the Respondent's agent Ms. Trisonya Abraham of TTM Management, Respondent neither engaged in the arbitration proceedings at hand nor made any submissions within the time limits set – and extended twice upon request – by the Arbitrator in accordance with the FAT Rules.

5. Jurisdiction

5.1. Review ex officio

33. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the

basis of the record as it stands.[1]

34. Pursuant to Article 2.1 of the FAT Rules, *"[t]he seat of the FAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland (...)."* Hence, this FAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

35. The jurisdiction of the FAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.

5.2. Arbitrability

36. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177 (1) PILA.[2]

5.3. Formal and substantive validity of the arbitration agreement

37. The existence of a valid arbitration agreement will be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be concluded in writing, by telegram, telex,*

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1 Decision of the Swiss Federal Tribunal of 19 April 1994, reported in ATF 120 II 155, *162*.

2 Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, ATF 118 II 353, *356*, cons. 3b.

telefax or any other means of communication which allow proof of the agreement by text.

2 Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law."

38. The Arbitrator finds that the jurisdiction of the FAT over the dispute between Claimant and Respondent results from the first paragraph of a Clause titled "FIBA" in the Player Contract, which reads as follows:

> *"**FIBA:***
> *This agreement is to be governed and interpreted in accordance with FIBA regulations, and the FIBA Arbitral Tribunal. All parties in this agreement (club, player and representative) consent to the jurisdiction of the FIBA Arbitral Tribunal relative to any action or procedure that may arise relating to this agreement."*

39. The Player Contract is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.

40. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording "*any action or procedure that may arise relating to this agreement*" in the first paragraph of the Clause titled "FIBA" in the Player Contract covers the present dispute.[3]

41. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimant.

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[3] *See* BERGER/KELLERHALS: Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, N 466.

6. Other Procedural Issues

42. Article 14.2 of the FAT Rules, which the Parties have declared to be applicable in the Player Contract, specifies that "the Arbitrator may nevertheless proceed with the arbitration and deliver an award" if "the Respondent fails to submit an Answer". The Arbitrator's authority to proceed with the arbitration in case of default of one of the parties is in accordance with Swiss arbitration law[4] and the practice of the FAT.[5] However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

43. This requirement is met in the current case. Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in line with the relevant rules. It was also given ample opportunity to respond to the Claimant's Request for Arbitration: upon Respondent's request the Arbitrator extended twice the time limit for the filing of the Answer. Still, Respondent has chosen not to respond within the time limit set by the Arbitrator according to the FAT Rules.

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4 Decision of the Swiss Federal Tribunal dated 26 November 1980, in: Semaine Judiciaire (SJ) 1982, p. 613 et seq., p. 621; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international - Droit et pratique à la lumière de la LDIP, Bern 2010, N 483; LALIVE/POUDRET/REYMOND: Le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, Art. 182 PILA N 8; RIGOZZI: L'Arbitrage international en matière de sport, Basel 2005, N 898; SCHNEIDER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 182 PILA N 87; VISCHER, in: Zurich Commentary to the PILA, 2nd ed., Zurich/Basel/Geneva 2004, Art. 182 PILA N 29.

5 *See* for instance FAT Decision 0001/07 dated 16 August 2007, Ostojic and Raznatovic vs. PAOK KAE; FAT Decision 0018/08 dated 10 February 2009, Nicevic vs. Beşiktaş; FAT Decision 0020/08 dated 19 March 2009, Dimitropoulos vs. Athlitiki Enosis Konstantinoupoleos; FAT Decision dated 11 May 2009, Sakellariou and Dimitropoulos vs. S.S. Felice Scandone Spa.; FAT Decision 0030/09 dated 12 May 2009, Vujanic vs. Enterprise Men's Basketball Club "Dynamo" Moscow; FAT Decision 0031/09 dated 12 May 2009, Misanovic and Ristanovic vs. Enterprise Men's Basketball Club "Dynamo" Moscow; FAT Decision 0010/08 dated 16 June 2009, Grgurevic vs. AEP Olympias Patras; FAT Decision 0043/09 dated 13 October 2009, Gomis vs. Women's Basketball Club Fenerbahçe.

7. Discussion

7.1. Applicable Law – *ex aequo et bono*

44. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide *"en équité"*, as opposed to a decision according to the rules of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo".*

45. With regard to the applicable law, the Player Contract contains the following wording (second paragraph of the Section titled "FIBA"):

> *"All parties to this agreement accept the resent English version of this contractual agreement as fully binding under both Italian and FIBA laws and guidelines."*

46. This clause could be read as a choice of Italian law for the entire contract. Indeed, in its Request for Arbitration, Claimant refers to a specific provision of the Italian civil code and attaches the respective wording as Exhibit 14. However, when interpreting the entire arbitration clause in the Player Contract the Arbitrator finds that the Parties agreed on FAT arbitration and the respective set of rules, including the provision governing the applicable law (Article 15.1 of the FAT Rules) which provides the following:

> *"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."*

47. The Arbitrator finds that the reference to Italian law in the Player Contract is restricted to the validity and the binding force of the contract but does not constitute an agreement of the Parties that the entire contract and any issue arising therefrom should be governed by Italian law.

48. The Arbitrator will therefore decide the present matter *ex aequo et bono.*

7.2. The statutory concept of *ex aequo et bono* arbitration

49. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*[6] (Concordat),[7] under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit*:

> *"When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[8]

50. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the*

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6 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

7 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

8 JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

circumstances of the case at hand".[9]

51. This is confirmed by Article 15.1 of the FAT Rules *in fine* according to which the arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

52. In light of the foregoing developments, the Arbitrator makes the following findings:

8. Findings

53. The Arbitrator must decide the following issues:

   a. Was Claimant entitled to rescind or terminate the Player Contract?

   b. If yes, what are the consequences of the rescission or termination of the Player Contract?

   c. What is the correct quantum of the claims?

8.1. Rescission or termination of the Player Contract

54. The Player Contract lists certain reasons which entitle the Club to unilaterally rescind the contract without any further obligation to the player, namely the conviction for the

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[9] POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

usage and/or the trafficking of illegal substances and pregnancy. In addition, most jurisdictions allow an early termination of a continuing obligation for good cause even if such termination right is not explicitly mentioned in the contract. Material breach of a contract is commonly regarded as a sufficient cause for early termination.

55. Under certain conditions a contract may be *rescinded*, which means that it is annulled from the beginning ("*ex tunc*"), or it is *terminated* and becomes unenforceable at the moment of termination ("*ex nunc*"). In case of doubt and according to the general principle of *pacta sunt servanda*, rescission is rather the exception whereas termination is the rule where there is a material breach of contract. Rescission of a contract leads to a mutual restitution of all benefits according to the rules of unjust enrichment. If a contract is terminated, the party who was not in breach of the contract may claim damages.

56. In its email of 3 November 2008, Claimant purported to rescind the Player Contract because of Respondent's self-induced ineligibility for the first Euroleague game, the fact that she missed a number of training sessions and the late disclosure of the pending legal proceedings against her due to __________. The letter dated 5 February 2009 then speaks of the "cancellation" and also of the "rescission" of the Player Contract for the same reasons as above.

57. According to the documentary evidence submitted by Claimant, Respondent arrived in Italy on 12 or 13 October 2008. The confirmation of a flight ticket indicates a departure from the USA on 12 October 2008. Her mobile phone was acquired on 14 October 2008 in Schio and the receipt of an advance on expenses of EUR 500.00 which was signed in Schio also bears the date of 14 October 2008. However, she could not travel to Russia for the first Euroleague game on 16 October 2008, because she had failed to timely get a visa for entering Russia.

58. The Arbitrator has no doubt that it was not acceptable for the Club that Respondent missed two Euroleague games, one match of the Italian league and two training sessions during a very short period. Such breach of contract was severe and entitled the Club to take appropriate action including terminating the contract without further warning.

59. In addition, Claimant submits that Respondent had not disclosed the fact that a criminal proceeding was pending in the USA because of __________. Claimant then states that it would not have contracted Respondent if it had been aware of the pending legal proceeding. Claimant is thus asserting a fundamental error when it signed the Player Contract which would allow for rescission of the Player Contract and restitution of the funds granted.

60. Whether an error was fundamental and would allow Claimant to rescind the Player Contract depends on whether or not it was acceptable for Claimant to continue the contractual relationship when it learned of the relevant circumstances. According to Claimant's own submission, it learned about the pending proceeding after Respondent's arrival in Italy and it acknowledged her return to the USA on 20 October 2008 in connection with the said proceeding. There is no evidence that Claimant took any disciplinary steps or issued at least a warning against Respondent when she returned later than promised, i.e. on 29 October 2008, or when it learned that Respondent had to __________. Only when Respondent missed two training sessions on 30 October and 1 November 2008, the Club decided to rescind the Player Contract.

61. Under these circumstances, the Arbitrator finds that the fact that Respondent was subject to a criminal proceeding because of __________ did not constitute a fundamental error in the conclusion of the Player Contract which would allow Claimant to rescind it. The court order providing for __________ was issued *after* the signing of

the Player Contract and can therefore not be stated to be a fundamental piece of information which Respondent failed to disclose to Claimant when they signed the Player Contract. Whether the duty to __________ prevented or substantially handicapped Respondent's engagement in away-matches must be left open as well, since the Arbitrator has not been provided with the content of the court order or further details as to __________ which was imposed by the court.

62. To sum up, the Arbitrator finds that Claimant was entitled to terminate the Player Contract because Respondent did not participate in two Euroleague games and one match of the Italian league and missed two training sessions, all within a short period of a few days. The termination took effect as of 3 November 2008.

8.2. The consequences of the termination of the Player Contract and the quantum of the damages

63. If a party terminates a contract early and for good cause, it is entitled to damages. Such damages are of compensatory nature, i.e. the amount of damages shall not exceed the amount of the actual loss as specified by the claiming party. Claimant submits that it suffered the following loss:

   a. Salary payment in excess of the actual duration of the Player Contract (USD 40,312.50);

   b. Damages (USD 165,500.00) including

      i. Payment to the Player Representative (USD 15,500.00)

ii. Flight tickets (EUR 10,793.19)

iii. Payment on account of allowances (EUR 500.00)

iv. Lost mobile phone (EUR 279.00)

v. Return and repair of her car (EUR 434.00)

8.2.1 Salary payment

64. The Arbitrator finds that Respondent is entitled to a salary for the time during which she actually played for the club. He agrees with Claimant that the Club could actually count on Respondent only during one week for which a pro rata salary is due. According to the bank statements, Claimant paid an amount of USD 39,125.00 to Respondent from which the pro rata salary of one week of USD 9,687.50 shall be deducted, which results in an amount of USD 29,437.50 to be restituted to Claimant.

65. With regard to the initial payment of USD 10,000.00, the Player Contract explicitly states that it does not constitute a signing bonus but an advance payment. The payment was made only upon arrival of Respondent. However, due to the nature as an advance payment, it shares the fate of the salary payments and must be reduced *pro rata* to the period during which Respondent actually provided her services, i.e. one week of the entire term of the contract (31 weeks), corresponding to USD 322.58. The remaining amount of USD 9,677.42 must be restituted to Claimant.

66. Claimant requests interest on the salary payments to be restituted, to be calculated since the date of termination of the Player Contract, i.e. 3 November 2008. Claimant does not indicate a specific interest rate.

67. Although the Player Contract does not explicitly provide that the debtor must pay default interest, this is a generally accepted principle which is embodied in most legal systems and the rate of 5% a generally accepted rate for default interest. The Arbitrator, deciding *ex aequo et bono* and in line with the jurisprudence of the FAT, decides that the interest rate of 5% per annum must be applied on the restitution payments of USD 39,114.92 since the day following the termination of the Player Contract, i.e. 4 November 2008.

8.2.2 Damages

68. Claimant asks for a compensation of damages in the total amount of USD 165,500.00. This amount consists of a share for commission of USD 15,500.00 and a lump-sum of USD 150,000.00 for several claims including flight tickets, payment on account of allowances, mobile phone and car return and damage to Claimant's image. All these claims are listed by Claimant in its Request for Arbitration and the supporting exhibits.

(a) Agent Fee

69. Claimant submits that it is entitled to obtain from Respondent the first installment of the Agent Fee which it paid to TTM Management since this payment was not justified because of the early termination of the Player Contract. Thus, the paid Agent Fee constituted a damage for which Respondent was liable.

70. The Arbitrator agrees with Claimant that payments made to TTM Management may be considered as damage if and to the extent such payments were intended to compensate TTM Management for its ongoing services during the term of the Player Contract and if the Player Contract was terminated early because of Respondent's bad behavior.

71. The Arbitrator finds that the Agent has performed the services for which the paid Agent Fee was due, namely the successful placement of the Player with the Club and is entitled to the paid installment of the Agent Fee. The second installment of the Agent Fee was neither paid nor reclaimed. It can therefore be left open whether or not the Agent was entitled to the second installment of the Agent Fee.

72. The Arbitrator finds therefore that Claimant is not entitled to damages in the amount of the paid installment of the Agent Fee.

(b) Flight Tickets

73. According to the Player Contract, Respondent was entitled to four round trip tickets from destination cities and departure cities of her choice between the USA and Italy. The Arbitrator finds it fair that the first round ticket by which she initially arrived in Italy and which allowed her to return to the USA on or before 29 December 2008 remains to be paid by Claimant. However, the Arbitrator agrees with Claimant to charge Respondent with the costs of the second flight from the USA to Italy (travel period from 26 October 2008 to 29 December 2008) which was obviously used for attending the court hearing.

74. Respondent must therefore refund the corresponding cost of EUR 7,798.19 to Claimant.

(c) Pre-payment on account of allowances

75. According to a written confirmation signed by Respondent on 14 October 2009, she was paid a retainer of EUR 500.00 on account of her allowances. The Player Contract does not provide for such allowances. In the absence of any further information, the

Arbitrator is unable to determine whether such amount must be considered as damage and therefore repaid by Respondent.

76. Thus, such cost cannot be taken into account when determining the amount of damage suffered by the Club.

(d) Lost mobile phone and car return

77. Claimant further requests the payment of the costs for a lost mobile phone in the amount of EUR 279.00 for which a receipt has been submitted. The Arbitrator finds that such costs must be repaid by Respondent.

78. However, no invoice, receipt or further details have been provided with respect to the costs of the car return and repair. Such costs can therefore not been taken into account when determining the amount of the damage suffered by the Club.

(e) Damage to Claimant's image

79. Claimant submits that it suffered further damage as a consequence of Respondent's breach of contract. In particular, without Respondent, the team did not reach the level of performance which was expected when Respondent was contracted and was eliminated early from the Euroleague tournament. In addition, Respondent's behavior affected the Club's image with the supporters, the media and the world of basketball.

80. It is true that if the exact amount of damages cannot be established, the Arbitrator shall assess them in his discretion, but it is still up to the claiming party to demonstrate the facts leading to the asserted loss and give certain indications about the quantum of the loss.

81. Claimant fails to provide any guidance on how the sporting failure shall be turned into a monetary compensation. No numbers about the decrease of income from sponsors or the sale of tickets are available. On the other hand, Claimant does not claim any costs for the substitution of the released player (e.g. the difference between the salary costs of a substitute compared to the saved salary payments because of the early termination of Respondent's contract). In fact, no substitute was available at the time. In addition, the Arbitrator finds no documentary support of Claimant's allegation that the Club's image was affected and how such loss of reputation should be measured.

82. The (undocumented) claim for damages for the sporting loss and the reputational harm might eventually be regarded as claim for a penalty for Respondent's breach of contract. However, the Player Contract does not contain any (even remote) indication which could serve as a legal basis for such a claim.[10] The Arbitrator finds therefore that the claim for damages for the sporting loss and reputational harm is unfounded and must be rejected.

8.3. Summary

83. Claimant is therefore awarded the following amounts:

Salary payments	USD 39,114.92
Flight tickets	EUR 7,798.19
Mobile Phone	EUR 279.00

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10 *See* also FAT Decision 0041/09 dated 12 November 2009, Panellinios BC vs Kelley at para. 82.

9. Costs

84. Article 17.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore, article 17.3 of the FAT Rules states that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

85. The Claimant's arbitration costs include the non-reimbursable handling fee of EUR 3,000.00, the Advance on Costs paid by the Claimant (EUR 4,000.00) as well as the Advance on Costs of Respondent, also paid by the Claimant (EUR 4,000.00). Such costs amount to EUR 11,000.00 in total.

86. On 4 October 2010, considering that pursuant to Article 17.2 of the FAT Rules "the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator", and that "the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the FAT President determined the arbitration costs in the present matter at EUR 8,000.00.

87. In the present case, the Arbitrator finds that 2/3 of the costs shall be borne by Claimant and 1/3 by Respondent, as the Claimant has been awarded its claim for restitution of the salary and certain costs but its claims for the Agent Fee and damages for sporting loss and reputational harm have been rejected. The comparison of the sums claimed and the sums awarded would lead to a different allocation of the arbitration costs.

However, the Arbitrator finds that Respondent's behavior which led to the termination of the Player Contract as well as her conduct during this arbitration proceeding are circumstances which compel a departure from the otherwise applicable principle embodied in Art. 17.1 of the FAT Rules.

88. Given that the Claimant paid the totality of the Advance on Costs of EUR 8,000.00, the Tribunal decides that:

    (i) Respondent shall pay Claimant 1/3 of the costs advanced by the Claimant, i.e. EUR 2,667.00.

    (ii) Furthermore, the Arbitrator considers it adequate that the Claimant is entitled to the payment of a contribution towards its legal fees and other expenses (Article 17.3. of the FAT Rules). The Arbitrator holds it adequate to take into account the non-reimbursable fee when assessing the expenses incurred by the Claimant in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at 1/3 of the amount of its fees and expenses as well as the non-reimbursable fee of EUR 17,672.02 in total, which results in a reimbursement of EUR 5,890.67.

10. AWARD

For the reasons set forth above, the Arbitrator decides as follows:

1. **Ms. Kara Braxton is ordered to pay to A.S.D. Pallacanestro Femminile Schio the amount of USD 39,114.92 together with interest of 5 % p.a. since 4 November 2008.**

2. **Ms. Kara Braxton is ordered to pay to A.S.D. Pallacanestro Femminile Schio the amount of EUR 8,077.19.**

3. **Ms. Kara Braxton is ordered to pay to A.S.D. Pallacanestro Femminile Schio the amount of EUR 2,667.00 as a reimbursement of the advance on arbitration costs.**

4. **Ms. Kara Braxton is ordered to pay to A.S.D. Pallacanestro Femminile Schio the amount of EUR 5,890.67 as a reimbursement of its legal fees and expenses.**

5. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 11 October 2010

Stephan Netzle
(Arbitrator)